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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/734,459	12/12/2003	Evan Kirshenbaum	200207642-1	9694

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EXAMINER

WONG, LUT

ART UNIT	PAPER NUMBER
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2129

NOTIFICATION DATE	DELIVERY MODE
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03/19/2008

ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

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Office Action Summary	Application No. 10/734,459	Applicant(s) KIRSHENBAUM, EVAN	
	Examiner LUT WONG	Art Unit 2129	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 19 December 2007.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-10 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-10 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

This office action is responsive to an AMENDMENT entered Dec 17, 2007 for the patent application 10/734459

The Office Action of Sept 11, 2007 is fully incorporated into this Office Action by reference.

Status of Claims

Claims 1-10 are pending. Claim 1 has been amended. Claims 11-30 have been withdrawn. A complete reply to the final rejection must include cancellation of nonelected claims 11-30 or other appropriate action (37 CFR 1.144) See MPEP § 821.01.

Claim Rejections - 35 USC § 112

Response to Arguments

Applicant's amendments to the claims have been fully considered and are persuasive. The 112 2nd paragraph rejections of claims 1-10 have been withdrawn.

Claim Rejections - 35 USC § 102

Claims 1-2, 4, 6-10 are rejected under 35 U.S.C. 102(b) as being anticipated by Evan Kirshenbaum ("Modeling Disk Arrays Using Genetic Programming") as set forth in the previous office action for reason of record.

Response to Arguments

Applicant's arguments filed 12/17/2007 have been fully considered but they are not persuasive.

In re pg. 9, applicant argues "the invention set forth in claim 1 is **for** ..."

In response, EN:¶4 applies.

In re pg. 10, applicant argues

In contrast, Kirshenbaum describes a use of genetic programming to evolve models that predict throughput in disk arrays. There is no apparent suggestion by Kirshenbaum of a candidate solution having a "credibility rating indicating a degree to which the performance measure is representative of the difficulty measure of the particular training case" in combination with "modifying the difficulty measure ... based on the performance measure of the candidate solution ... and the credibility rating of the candidate solution." Since these limitations are neither taught nor suggested by Kirshenbaum, claim 1 is understood to be novel.

In response,

1) Applicant's arguments fail to comply with 37 CFR 1.111(b) because they amount to a general allegation that the claims define a patentable invention without specifically pointing out how the language of the claims patentably distinguishes them from the references.

2) Although the claim language has been changed, such changes are more directed to formal matter rather than the scope of the claim.

3) In the event that the applicant wishes to amend the applicant should further define e.g., "credibility rating", difficulty measure". The Examiner suggests incorporating equations, such as spec pg. 7 L5-10, L20-30, into the claim to make it clear what credibility rating and difficulty measure are. Otherwise, the claims are still being treated

under broadest reasonable interpretation, which means the reference still reads on the claim.

In re pg. 10, applicant argues

Claims 2, 4, and 6-10 depend from claim 1 and include further limitations that refine the limitations of claim 1. Thus, the Office Action has not shown that Kirshenbaum teaches the limitations of these dependent claims.

The rejection of claims 1-2, 4, and 6-10 should be withdrawn because the Office Action has not shown that all the limitations of the claims are anticipated by Kirshenbaum.

In response, the rejection is maintained since claim 1 is still being rejected.

Claim Rejections - 35 USC § 103

Claims 3 and 5 are rejected under 35 U.S.C. 103(a) as being unpatentable over Evan Kirshenbaum ("Modeling Disk Arrays Using Genetic Programming") as set forth in the previous office action for reason of record.

Response to Arguments

Applicant's arguments filed 12/17/2007 have been fully considered but they are not persuasive.

In re pg. 10, applicant argues

Claims 3 and 5 are understood to be patentable under 35 USC §103(a) over Kirshenbaum. The rejection is respectfully traversed because the Office Action does not show that all the limitations are suggested by the reference and does not provide a proper motivation for modifying the teachings of Kirshenbaum.

Claims 3 and 5 have claim 1 as a base claim. Thus, the Office Action has not shown that Kirshenbaum suggests the limitations of claims 3 and 5 for at least the reasons set forth above. Furthermore, the asserted motivation for modifying Kirshenbaum is unsupported by evidence. Therefore, a *prima facie* case of obviousness has not been established and the rejection should be withdrawn.

In response, the rejection is maintained since claim 1 is still being rejected.

Examiner Note (EN)

¶4: The phrase “**for**” is treated as intended use. It does not constitute a limitation in any patentable sense. MPEP 2106 IIC states

“Language that suggests or makes optional but does not require steps to be performed or does not limit a claim to a particular structure does not limit the scope of a claim or claim limitation. The following are examples of language that may raise a question as to the limiting effect of the language in a claim:

(A) statements of intended use or field of use”

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the

shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Lut Wong whose telephone number is (571) 270-1123. The examiner can normally be reached on M-F 7:30-5.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Vincent David can be reached on (571) 272-3080. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

/Lut Wong/
Patent Examiner, AU 2129

/David R Vincent/

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Supervisory Patent Examiner, Art Unit 2129